Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-581

IN THE

Supreme Court of the United States

October Term, 1986

NEW YORK STATE RESTAURANT ASSOCIATION, INC.; BUS TRAVELERS INN, INC.; and HERO-BOY, INC., d/b/a Manganaro's Hero-Boy Restaurant,
Plaintiffs-Appellants,

against

THE CITY OF NEW YORK; and DAVID J. SENCER, M.D., M.P.H., Commissioner of Health of The Department of Health, and Chairman of the Board of Health,
Defendants-Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

Brief in Opposition to Motion to Dismiss or Affirm

GERARD A. NAVAGH
Counsel for Plaintiffs-Appellants
420 Lexington Avenue
New York, NY 10170
(212) 687-5666

Table of Contents.

	Page
Table of Authorities	i
Statement	1
Opinion of Supreme Court, Special Term (Wolin, J., October 4, 1985)	3
Opinion of Supreme Court, Special Term (Ostrau, J., February 6, 1984)	6
Conclusion	7

TABLE OF AUTHORITIES.

CASES:

Camara v. Municipal Court, 387 U. S. 523	7
Colonnade Catering Corp. v. United States, 397 U. S. 72 (1970)	7
Marshall v. Barlow's, Inc., 436 U. S. 307	7
Rosenthal v. Hartnett, 36 N. Y. 2d 269	5
See v. City of Seattle, 387 U. S. 541	7
Subcontractors Trade Association, *et al.* v. Koch, 62 N. Y. 2d 426	4, 5

Page

Voccola v. Shilling, 88 Misc. 2d 103, aff'd 57 A. D. 2d 931 5

Ward v. Village of Monroeville, 409 U. S. 57 6

Youngstown Co. v. Sawyer, 343 U. S. 579 4

STATUTES:

United States Code:

18 U.S.C. §1962[c] 3

18 U.S.C. §1962[d] 3

McKinney's Session Laws of New York, 1972: L. 1972, Ch. 982 2

McKinney's Session Laws of New York, 1980: L. 1980, Ch. 221 2

New York City Administrative Code: Sec. 883a-7.0(b) 2

OTHER AUTHORITIES:

New York Law Journal, December 15, 1980, City of Hudson Ordinance 2

No. 86-581

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986.

NEW YORK STATE RESTAURANT ASSOCIATION, INC.; BUS TRAVELERS INN, INC.; and HERO-BOY, INC., d/b/a Manganaro's Hero-Boy Restaurant,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK; and DAVID J. SENCER, M.D., M.P.H., Commissioner of Health of The Department of Health, and Chairman of the Board of Health,

Defendants-Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

Brief in Opposition to Motion to Dismiss or Affirm.

Statement.

The appellants, New York State Restaurant Association, Inc., *et al.*, submit this brief in opposition to ap-

pellees' motion to dismiss or affirm and request that this motion either be summarily dismissed or at the least, probable jurisdiction should be noted in the case. The appeal is from a final order of the Court of Appeals of the State of New York entered on July 10, 1986.

For many years violations of the New York City Health Code were heard in the Magistrates Court, for they were criminal proceedings. On October 28, 1971, the Board of Health promulgated Article 7 of the Code without any enabling legislation from the State, or for that matter, from the City of New York. The enforcement of the resolution was held in abeyance for over a year because it was not filed with the City Clerk.

From the beginning the proposal was ill-fated, with the Department insisting that it be modeled after the City Parking Violations Bureau, Administrative Code §883a-7.0(b), while the appellant Association was contending that the proper constitutional method would be to set up a special Part in the Civil Court as was done with respect to housing violations under Chapter 982 of the Laws of 1972.

As noted in appellants' briefs below, in 1980 the Common Council of the City of Hudson approved an ordinance which made parking tickets returnable to the police department, not the Court. The Court was of the opinion that keeping the return of tickets within the judicial system, "there is no room for ticket fixing or favoritism". The Attorney General ruled the ordinance invalid (New York Law Journal, December 15, 1980).

Chapter 221, Laws of 1980, amended Sec. 558(d) of the City Charter so as to add an extraordinary enabling Act

nine years after the administrative tribunal was created in 1971, and had the following opening sentence:

> "Any violation of the health code shall be treated and punished as a misdemeanor."

Significantly, that section is omitted in appellees' appendix (A1), although quoted and set forth in extense in its previous briefs in the Court below.

In January 1985 the New York City Parking Violations Bureau became involved in the largest New York City corruption scandal in fifty years, implicating powerful local political figures and senior officials of the Bureau. The Borough President of Queens committed suicide, and the Borough President of the Bronx has been found guilty under jury verdict of racketeering (18 U.S.C. §1962[c]) and racketeering conspiracy (18 U.S.C. §1962[d]).

This concludes the description of the interconnected parallel courses followed by the Health Code Tribunal and the Parking Violations Bureau legislation in this case. In retrospect it is not surprising that the Parking Violations Bureau scandal arose; the surprise is that it did not happen sooner. The appellants have been concerned about such an abuse of the power since 1971 and have expended a great deal of time and money to remove the temptation for such abuse being put in motion with respect to the administrative tribunal under the Health Code.

Opinion of Supreme Court, Special Term (Wolin, J., October 4, 1985)

The Wolin, J. opinion in Special Term is for the most part the opinion under review by this Court. (Appendix,

4a, Jurisdictional Statement). One of the main contentions of the appellants below was that the Board of Health, by its own unilateral action, transferred jurisdiction from the Magistrates Court to an Administrative Tribunal. This consolidated in the Board the Legislative, Executive and Judicial power, which the appellants claim is unconstitutional, and then brushes off in a few lines the appellants, saying the action implements legislation enactments, citing no authority for its holding.

Citing *Youngstown Co. v. Sawyer,* 343 U.S. 579, Judge Jasen of the New York Court of Appeals carefully analyzed the principles of the constitutional separation of powers in *Subcontractors Trade Association et al. v. Koch,* 62 N. Y. 2d 426, and gave his analysis of the substantive issues involved in the separation of powers of government, stating:

> "We begin our analysis of the substantive issues presented by recognizing that the underlying structure of our representative system of government consists of three branches in which all governmental power is distributed—the executive, legislative and judicial (N. Y. Const., art. III, §1; art. IV, §1; art. VI; see, also, N.Y. City Charter, ch. 1, §3; ch. 2, §21.) Respect for this structure and the system of checks and balances inherent therein requires that none of these branches be allowed to usurp powers residing entirely in another branch. *(Youngstown Co. v. Sawyer,* 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153; *Matter of Nicholas v. Kahn,* 47 N. Y. 2d 24, 30-31, 416 N. Y. S. 2d 565, 389 N. E. 2d 1086.) In the case before us, we are called upon to decide * * * at what point an exercise of executive power becomes an unlawful infringement upon the legislative function."

Citing *Nixon v. Administrator of Gen. Servs.*, 433 U. S. 425, Justice Wachtler, Chief Judge, stated in *Under 21 v. City of New York,* 65 N. Y. 2d 346, as follows:

> "* * * While the doctrine of separation of powers does not require the maintenance of 'three airtight departments of government' " (*Nixon v. Administrator of Gen. Servs.*, 433 U. S. 425, 443, 97 S. Ct. 2777, 2790, 53 L. Ed. 2d 867; 1 Store, Commentaries on the Constitution §525, *supra*), it does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch (*Youngstown Co. v. Sawyer, supra; Matter of Nicholas v. Kahn,* 47 N. Y. 2d 24, 30-31, 416 N. Y. S. 2d 565, 389 N. E. 2d 1086)."

Wolin, J., in the case at bar in Special Term, in a passing reference to *Subcontractors Trade Association, supra,* and *Under 21 v. City of New York,* states that these cases merely stand for the proposition that the executive may not implement a remedial program and exceed the stated policy of the legislature. His interpretation would negate the principle of separation of powers entirely. Justice Asch, in the Appellate Division, in *Under 21,* 108 App. Div. 2d 250, was more honest when he stated it was a "vestigial relic." One might not like his conclusion, but he at least had the courage to state it forthrightly and unequivocally.

The Wolin opinion also relies on the parking violation cases of *Rosenthal v. Hartnett,* 36 N. Y. 2d 269, and *Matter of Voccola v. Shilling,* 88 Misc. 2d 103 aff'd 57 A. D. 2d 931 (Appendix 8a and 9a, Jurisdictional Statement). It is significant to note that in spite of that reliance and the respondents reliance on them in the courts below, nowhere

are those cases mentioned in the motion to dismiss or affirm now before the bar, probably because those involved the now discredited parking violations bureau cases, and *Hartnett* involved, in addition, the imposition of a criminal penalty by an administrative board. The opinion by Wolin, J. also points out that the determination of the administrative tribunal would be subject to review in an Article 78 proceeding. In *Ward v. Village of Monroeville,* 409 U. S. 57 (1972), this Court held that there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Certainly, no such suggestion can be drawn from the numerous appeals in the instant case.

Opinion of Supreme Court, Special Term Ostrau, J., February 6, 1984.

In its motion papers to dismiss or affirm, on page 11, the appellees make reference to the Ostrau, J. decision of February 6, 1984, and point out, out of context, that the plaintiffs failed to demonstrate their likelihood of success. This is an extremely misleading statement, for the rule mentioned is applicable only to an application for a preliminary injunction, and in the application made before issue is joined under New York practice. The appellees could have pointed out that Judge Ostrau's opinion also held that the dismissal of the action of appellants for failure to state a cause of action against the State of New York was unwarranted. It can be plainly seen, that point is a much more significant determination than denial of an application for a preliminary injunction before issue was joined.

At the very outset of this action, the plaintiffs alleged that the procedures of the Department of Health con-

stituted a denial of due process and equal protection of the law under the Fourteenth Amendment of the U.S. Constitution in paragraph Eleventh of the Complaint. The Fourth Amendment prohibiting unreasonable search and seizure is incorporated in the Fourteenth Amendment in actions against the State, and this record is replete with references to the respondents' actions in these procedures in affidavits, regulations (§3.01 on page A2 of appellees' motion) and other documents, and in the reports filed by the Comptroller's office (Jurisdictional Statement, p. 9), which were publicized in the public press and which the appellees collaborated in the preparation of. For a brief summary of appellants' Fourth Amendment point, see page 9 of Jurisdictional Statement. *Marshall v. Barlow's Inc.*, 436 U. S. 307; *Camara v. Municipal Court*, 387 U. S. 523; *See v. City of Seattle*, 387 U. S. 541. *Colonade Catering Corp. v. United States*, 397 U. S. 72 (1970). This case is inapposite since it involved a liquor revenue matter in which Congress expressly granted authority for the search within certain limited conditions which are not present in the instant case.

CONCLUSION.

This motion should either be summarily dismissed or at the least, probable jurisdiction should be noted in this case.

Respectfully submitted,

GERARD A. NAVAGH
Attorney for Plaintiffs-Appellants